

STATE OF SOUTH CAROLINA  
In The Supreme Court

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JUL 27 2016

**SC SUPREME COURT**

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

The Honorable Brooks P. Goldsmith, Circuit Court Judge

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Appellate Case No. 2015-001205

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Maurice C. Kinard, ..... Petitioner,

v.

State of South Carolina, ..... Respondent.

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**RETURN TO PETITION FOR  
WRIT OF CERTIORARI**

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## STANDARD OF REVIEW

The Court gives great deference to the post-conviction relief (“PCR”) court's findings of fact and conclusions of law. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). In reviewing the PCR judge's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision. Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006). This Court will uphold the findings of the PCR judge “if there is any evidence of probative value sufficient to support them.” Dempsey, 363 S.C. at 368, 610 S.E.2d at 814. “If no probative evidence exists to support the findings, the Court will reverse.” Id. at 368–69, 610 S.E.2d at 814. Holden v. State, 393 S.C. 565, 573, 713 S.E.2d 611, 615-16 (2011).

**QUESTION PRESENTED**

Did the post-conviction relief judge err in finding defense counsel was not ineffective in failing to file a notice of appeal?

## STATEMENT OF THE CASE

Petitioner was indicted during the February 2011 term of the Richland County Grand Jury for Murder (2011-GS-40-1134). Petitioner was represented by Tivis C. Sutherland, IV, Esquire. On December 9, 2013, Petitioner appeared before the Honorable Diane S. Goodstein, where he pled guilty to Voluntary Manslaughter. Judge Goodstein sentenced Petitioner to twenty-five (25) years' imprisonment. Petitioner did not appeal his guilty plea or sentence.

Petitioner filed an application for post-conviction relief on April 7, 2014. App. p. 50. The State filed its return on June 10, 2014. App. p.58. Jonathan D. Waller, Esquire, represented Petitioner. App. p. 63. The Honorable Brooks P. Goldsmith (“the post-conviction relief judge”) convened an evidentiary hearing on the application at the Richland County Courthouse on April 1, 2015. App. p. 63. The post-conviction relief judge denied relief in an order filed May 22, 2015. App. p. 100.

A timely notice of intent to appeal was served on June 2, 2015. On February 1, 2016, counsel filed a petition for writ of certiorari pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), and a motion to be relieved as counsel. On April 25, 2016, this Court denied the motion to be relieved and directed the parties to address whether the post-conviction relief judge erred in finding defense counsel was not ineffective in failing to file a notice of appeal. Petitioner submitted his petition for writ of certiorari on May 25, 2016. This return to petition for writ of certiorari follow.

## ARGUMENT

### **I. The post-conviction relief judge properly found that defense counsel was not ineffective when he did not file a notice of appeal.**

Petitioner asserts that plea counsel was ineffective because he failed to file a notice of appeal as requested by Petitioner. This was not the finding of the post-conviction relief judge and, due to his unique ability to hear testimony and observe credibility, his finding should not be disturbed. It is well-settled law in this state that “[g]reat deference is given to the PCR court’s findings on matters of credibility, as the reviewing court lacks the opportunity to observe witnesses. Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999); Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 cert. denied, 510 U.S. 1014, 114 S.Ct. 607, 126 L.Ed.2d 572 (1993). See Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005); see also Harris v. Dir., Office of Workers’ Comp. Programs, U.S. Dep’t of Labor, 3 F.3d 103, 106-07 (4th Cir. 1993) (Appellate courts are ill-suited “to overturn a factfinder on a question on which two views of the evidence are possible. . . . Fact finders routinely resolve discrepancies between evidentiary sources, and by being able to observe testimony first-hand, they are in the best position to do so.”).

In a post-conviction relief proceeding, Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where ineffective assistance of counsel is alleged as a ground for relief, Applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler, 286 S.C. 441.

The proper measure of performance is whether the attorney provided representation

within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland, 466 U.S. 668). Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, (1985). Petitioner's allegation that Counsel was ineffective for failing to perfect his direct appeal, fails to show either deficiency or prejudice.

Counsel's failure to perfect a direct appeal of the guilty plea is not deficient under reasonable professional norms. While trial counsel is required to make certain the defendant is fully aware of the right to appeal, the standard for a guilty plea differs. Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008). A guilty plea both reduces the scope of potentially appealable issues and indicates that the defendant seeks an end to judicial proceedings. A court must consider factors such as whether the defendant received the sentence bargained for and whether the plea expressly reserved or waived some or all appeal rights. Jones v. State, 382 S.C. 589, 677 S.E.2d 20 (2009). Counsel has a constitutionally imposed duty to consult a defendant

about a direct appeal from a guilty plea only when there is reason to think either that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal) or that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995)). In making this determination, courts must take into account all the information counsel knew or should have known. Failure to insist upon a direct appeal may waive the defendant's right to appeal. See Bonnette v. State, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981) (citing 92 C.J.S. Waiver, p. 1063 (1955) (Acts inconsistent with the continued assertion of a right, such as a failure to insist upon the right, may constitute waiver.))

The PCR Court weighed these factors and found that Petitioner could not carry his burden to prove Counsel was ineffective in failing to file a notice of appeal. App. p. 106. The PCR Court noted that Counsel believed an appeal would be frivolous and that he credibly emphasized that the two worked hard for the plea deal and received a near best-case scenario in being able to plead to the lesser-included offense of voluntary manslaughter in the place of murder. Id. The PCR Court further found that petitioner was advised by the plea court that if he wished to appeal, he would have ten (10) days to do so. Id. Plea counsel testified that he did not see a reason to appeal because the guilty plea was negotiated, and they had received what they had bargained for. App. p. 90, line 22 - p. 91, lines 1-6. Plea counsel also testified that that under certain circumstances and recent case law, he believed the appeal of a guilty plea could have been frivolous. App. p. 91, lines 2-6. All these facts together furnish probative evidence to support the PCR Court's finding that Petitioner could not carry his burden of showing deficiency in Counsel's failure to appeal.

Furthermore, Petitioner failed to show that any alleged deficiency of Counsel prejudiced his case. To show prejudice where Counsel does not perfect a direct appeal of a guilty plea, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed. Jones, 382 S.C. 589 (citing Roe v. Flores-Ortega, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)). The PCR court found that Applicant failed to present credible evidence showing how he was prejudiced by his Counsel's alleged deficiency. App. p. 106, citing: Rule 71.1(e), SCRCP; Butler v. State. 286 S.C. 441, 334 S.E.2d 813 (1985). The PCR court did not find credible Petitioner's testimony that he had asked for an appeal the day of the sentencing hearing, and the only other evidence in the record to suggest Petitioner would have appealed is a letter asking about a potential appeal sent long after the deadline had passed. App. p. 90, lines 2-19. The PCR court further found there were no objections made at the guilty plea hearing, and Counsel had not reason to file a notice of appeal. App. p. 106. Finally, the fact that Petitioner has moved to file a belated appeal does not substantiate the assumption that he necessarily intended to appeal his plea in a timely fashion. This Court should defer to the PCR Court's finding of facts concerning Petitioner's intention to appeal at the time of the trial.

Petitioner has failed to show either deficiency of counsel or prejudice arising from plea counsel's decision not to file a notice of appeal after petitioner's voluntary guilty plea. Petitioner failed to satisfy either prong of Strickland with respect to his claims of ineffective assistance of counsel.

**CONCLUSION**

For the foregoing reasons, Respondent respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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By:   
ATTORNEYS FOR RESPONDENT

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**CERTIFICATE OF SERVICE**


The undersigned hereby certifies that a copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by mailing two (2) copy in the United States mail, postage prepaid, addressed to Petitioner's counsel:

**Katherine H. Hudgins, Esquire  
Appellate Defender  
S.C. Commission on Indigent Defense  
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This 27<sup>th</sup> day of July, 2016.

  
\_\_\_\_\_  
JESSICA E. KINARD  
ATTORNEY FOR RESPONDENT

SWORN to before me this 27<sup>th</sup> day of July, 2016.

  
\_\_\_\_\_  
Notary Public for South Carolina.  
My Commission Expires: 04-28-2025